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THE URBAN CRIMINAL JUSTICE SYSTEM: WHERE YOUNG + BLACK + MALE = PROBABLE CAUSE

Elizabeth A. Gaynes*

I. Introduction

People without a future can be dangerous. We live in a culture where most adults would cross the street rather than come in contact with a group of minority youth, and where most minority youth see a future that has no place for them.¹ We live in a country in which one out of four young African-American men is under some form of custodial supervision.² In our nation's capital, seven out of ten African-American men can anticipate being arrested and jailed at least once before reaching age thirty-five.³ We also live in a state where twice as many young African-American men are in prison as are enrolled full time in college.⁴ And we live in a city where a black man between the ages of fifteen and twenty-four is far more likely to die of homicide than all other causes combined.⁵

Young black men might not say they have no future, but they none-

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1. Barry Glick, *Governor's Task Force Tackles Growing Juvenile Gang Problem*, CORRECTIONS TODAY, July 1992, at 96; see also NEW YORK STATE DIV. FOR YOUTH, REAFFIRMING PREVENTION: REPORT OF THE TASK FORCE ON JUVENILE GANGS (1990) (youth involved in gangs or at the periphery of gang activity often are "unable to imagine a positive future. Many do not believe they will reach middle age").

2. MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990).

3. JEROME G. MILLER, NATIONAL CTR. ON INSTS. AND ALTERNATIVES, HOBLING A GENERATION: YOUNG AFRICAN AM. MALES IN WASHINGTON D.C.'S CRIMINAL JUSTICE SYS. 1 (1992) (on file with author). This report also documented that 42% of African-American males ages 18-35 were in jail or prison, on probation or parole, awaiting trial or sentencing, or being sought on warrants for their arrest, and that things are getting worse. While the number of black males in this age group decreased by 17% in the past decade, the number of adult arrests increased by 60%. *Id.*

4. THE CORRECTIONAL ASS'N OF N.Y. & NEW YORK STATE COALITION FOR CRIMINAL JUSTICE, IMPRISONED GENERATION: YOUNG MEN UNDER CRIMINAL JUSTICE CUSTODY IN NEW YORK STATE 1 (1990).

5. NEW YORK CITY DEP'T OF HEALTH, CHIEF CAUSES OF DEATH IN SPECIFIED AGE GROUPS BY SEX: 1989 (1990) (lists homicide as the cause of death for 66.3% of black males).

theless live their lives consistent with, and inside of, that belief. They hear the clues in the language around them, and not just from the "system." That they have no future beyond jail and the grave, is echoed by parents, teachers, girlfriends, and even some of their "role models" who share their resignation. That there is no opportunity becomes clear long before a child forms a response that might be considered criminal.

People without a future can be dangerous, and if we learned nothing from the aftermath of the first Rodney King verdict, we should have learned that. Writing them off is even more dangerous, not just because the financial cost of incarceration and riots is higher than the cost of providing real opportunity for all our citizens, but because there is a real need for the contributions they could make to their families, our communities, and to humanity.

Their future, as well as their past and present, is not unrelated to their race. While racism in the urban criminal justice system is not the only reason blacks are over-represented in the courts and in custody, it poisons most thinking and nearly all efforts to address the large numbers of young African-American men who are committing drug-related and violent crime in our cities. Discomfort and denial regarding racial issues won't make them go away.

In his seminal work on race, *Two Nations: Black and White, Separate, Unequal, and Hostile*, Professor Andrew Hacker is frank and challenging:

No other American race is wounding itself so fatally. Nor can it be said that black Americans chose this path for themselves. So in allocating responsibility, the response should be clear. It is white America that has made being black so disconsolate an estate. Legal slavery may be in the past, but segregation and subordination have been allowed to persist. Even today, America imposes a stigma on every black child at birth. . . . So the question for white Americans is essentially moral: is it right to impose on members of an entire race a lesser start in life, and then to expect from them a degree of resolution that has never been demanded from your own race?⁶

II. The Response of Urban Criminal Justice to Urban Minority Crime

It has not been kept secret from young African-American men that the official response to the problem of urban crime by minority youth

6. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 218-19 (1992).

has been prison, prison and more prison. The National Council on Crime and Delinquency projects that by 1994, the state and federal prison population will reach one million, an increase of more than 200% since 1980. When we add to the current prison population the number of people incarcerated in local facilities (city and county jails, such as New York City's Rikers Island), the total topped one million three years ago. This growth has come at great expense: in fiscal 1991, the United States spent more than \$20 billion to build, operate, and maintain its prison systems, with close to half of that amount dedicated to the incarceration of African-Americans.⁷

The juvenile custody trends are no better. Although the youth population declined by 11% during the 1980s, the number of juveniles in custody (based on a one-day count) increased 31%.⁸ The overall custody rates for juveniles in public and private facilities increased 46%, from 251 per 100,000 in 1979 to 367 per 100,000 in 1989.⁹ While the Justice Department reports that the juvenile population confined in public and private facilities increased by 13% from 1985 to 1989, this increase was not shared equally by racial and ethnic groups. During this period the proportion of black and Hispanic youths in custody increased by 9% and 4%, respectively, while the proportion of white youth held declined 13%.¹⁰

While high rates of crime and arrest of African-American male juveniles for drug offenses and violent crimes "are correlated with, and help to explain, high incarceration rates for these youth," recent studies make very clear that this is not the whole story.¹¹ A National Council of Crime and Delinquency ("NCCD") study concludes that there is "a discriminatory effect" somewhere in the juvenile justice decision-making process. Specifically, according to NCCD, an African-American youth with a violent felony offense was over three times more likely to be committed to a Youth Authority institution than a white youth with the same offense. This figure demonstrates

7. MARC MAUER, *THE SENTENCING PROJECT, AMERICANS BEHIND BARS: ONE YEAR LATER 1* (1992) [hereinafter MAUER, *AMERICANS BEHIND BARS*]. This groundbreaking report, using 1990 data, shows that between 1989 and 1990, the U.S. rate of incarceration increased by 6.8% to 455 per 100,000, with the rate of black males now 3,370 per 100,000 — a rate almost five times that of black males in South Africa. Today, the United States is secure in its position as world leader in its rate of incarceration. *Id.*

8. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *NATIONAL JUVENILE CUSTODY TRENDS 1978-1989 2* (1992).

9. *Id.*

10. *Id.*

11. JAMES AUSTIN ET AL., NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *THE OVER-REPRESENTATION OF MINORITY YOUTH IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM 14* (1992).

that African-American over-representation in secure facilities cannot be fully explained by behavior alone. In fact, "post-arrest factors, including detention and confinement decisions made by probation officers and judges, have an independent influence on differential minority incarceration rates."¹² A newspaper study of California plea bargaining practices, analyzing nearly 700,000 criminal cases, found that "at virtually every stage of pretrial negotiation, whites are more successful than non-whites."¹³

This disparity seems also to occur prior to arrest, and may affect the decision to arrest or even to assume that the individual may be a lawbreaker.¹⁴ Hacker suggests that "one reason why so many white policemen harass so many black youths is that they cannot catch the clues that distinguish law-abiding young men from those who are up to no good."¹⁵

Police officers are not the only ones who cannot distinguish one black young person from another. When I was walking through Washington Square Park in the company of a white city official, now a high level prosecutor, we observed a young black man crossing the street. Given the young man's book bag and demeanor, it could not have been more obvious to me that he was a New York University student. My companion, nonetheless, pronounced him to be a "walking felony."

More recently, at the Galleria, an upscale shopping mall in White Plains, New York, I observed security guards eject male black high school students because, and only because, they were wearing hooded sweat shirts. These shirts, which are especially popular among young blacks, apparently have been determined to be criminogenic. Less than twenty feet away, merchants were quite willing to sell the identical Champion "hoodies" to these youngsters for \$45.00 and up, as well as a wall poster of Jodeci (talented and successful black hip-hop recording stars), in which the members of the group are wearing, you guessed it, hooded sweat shirts.

Neither these suburban youngsters nor their parents are surprised when they are followed around stores, stopped for questioning, or otherwise harassed by shop owners, security guards or police of-

12. *Id.* at 17.

13. MAUER, AMERICANS BEHIND BARS, *supra* note 7, at 12 n.22 (citing Christopher Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991).

14. See *Florida v. Bostick*, 111 S. Ct. 2382 (1991); *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992) (stating that police officers do not need even a reasonable suspicion to question an individual, and certainly not probable cause).

15. HACKER, *supra* note 6, at 128.

ficers.¹⁶ Most black professionals can recount at least one incident of being stopped, roughed up, questioned, or degraded by white police officers.¹⁷ Al Joyner, an Olympic bronze medalist (and brother of Olympic track star Jackie Joyner Kersee, as well as husband of Florence Joyner, the world's greatest athlete), no longer drives in Los Angeles because of police harassment.¹⁸ It is not an exaggeration, as a recent article in *Essence* magazine bemoans, that "despite the decades of enormous Black success and achievement, police continue to view Black skin itself as 'probable cause.'"¹⁹

Following the Rodney King beating, an investigation into law enforcement practices was conducted by Amnesty International. The final report concluded that Los Angeles police officers resort to excessive force, including firearms, in violation of international standards, amounting to "torture, or other cruel or degrading" treatment. The report found evidence to suggest that "racial minorities, particularly Blacks and Latinos, have been subjected to discriminatory treatment and are disproportionately the victims of abuse."²⁰

Institutional racism in the criminal justice system is not just a California problem. The United States Sentencing Commission's report on mandatory sentencing found racial disparity in the means by which the sentencing statutes were implemented.²¹

These studies, and others like them, interesting though they may be, are not news to the youngsters involved, who have grown up firm in the belief that they do not have a chance, never mind an opportunity. They were not even born when the Kerner Commission, established in 1965 after the Watts riots to undertake a broad examination

16. See Courtland Milloy, *A Call to End Siege Mentality Among Police*, WASH. POST, Nov. 22, 1992, at B1.

17. See Charles N. Jamison, Jr., *Racism: The Hurt That Men Won't Name*, ESSENCE, Nov. 1992, at 63.

18. In an interview with Barbara Walters on 20/20, Al Joyner described what he perceives as excessive police preoccupation with black men. The television crew confirmed his view by sending out two groups of young men on successive evenings, taking identical routes, in identical vehicles, at identical times. The black group was stopped and questioned by police on several occasions. The white group counted police going by at least 16 times, never showing any interest in the group's activity. 20/20 (ABC television broadcast, Nov. 6, 1992).

19. Les Payne, *Up Against the Wall: Black Men and the Cops*, ESSENCE, Nov. 1992, at 134. See also *Morgan v. Woessner*, 975 F.2d 629, 633, 638-39 (9th Cir. 1992) (Joe Morgan, ex-baseball player, was physically assaulted in Los Angeles Airport by police who believed Morgan was accomplice of a black drug courier who told police that his accomplice "looked like me").

20. Payne, *supra* note 19, at 134.

21. MAUER, AMERICANS BEHIND BARS, *supra* note 7, at 10 & n.16 (citing U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991)).

of the relationship between police and the black community, announced that: "[o]ur nation is moving toward *two societies, one black, one white* — separate and unequal."²²

Perhaps it *was* news, twenty-five years ago, when the Commission reported:

Some of our courts . . . have lost the confidence of the poor. . . . The belief is pervasive among ghetto residents that . . . from arrest to sentencing the poor and uneducated are denied equal justice with the affluent, that procedures such as bail and fines have been perverted to perpetuate class inequities. We found that the apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders.²³

Yet it barely raised an eyebrow when, in 1991, the New York State Judicial Commission on Minorities found:

Little has changed [since the Kerner Commission report in 1968] for minority users of the courts. Although there has been an increase in the number of minority judges and attorneys, change for the minority court user has been so slow in coming that this Commission is constrained to draw the basic conclusion that there are *two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor*. . . . Nearly a quarter of a century later, inequality, disparate treatment and injustice remain hallmarks of our state justice system.²⁴

Given these conclusions, both the verdict in the first Rodney King case and the subsequent disorder were not surprising. Leading criminal justice expert Elliott Currie, author of *Confronting Crime: An American Challenge*, wrote in 1987 that changes in the economy and the transformation of work and employment opportunities were creating a 'Dual City':

Now I promise you that this means big trouble. It means a deepening division between the haves — who in the future will very likely "have" even more than they have now — and the "have-nots," who will probably have even less. Again, we know full well that this is a terribly volatile situation and one that produces criminal

22. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968) (emphasis added) [hereinafter NAC REPORT].

23. *Id.* at 337.

24. New York State Judicial Commission on Minorities, *Report of the New York State Judicial Commission on Minorities*, 19 FORDHAM URB. L.J. 171, 185 (1992) (emphasis added). "[M]ost minority persons will be wary of a system in which over 80 percent of the people sentenced to New York's prison are minorities, while more than 92 percent of the judges statewide are white." *Id.*

violence with terrifying predictability.²⁵

No doubt some would point out that the inequality and injustice that seem to plague the urban criminal justice system do not signify that the people in prison are innocent of serious crimes, or that a less disparate or more just process would have resulted in their release. While it is surely true that many of the same people would be incarcerated under virtually any system, no matter how fair or free of racism, it is not necessarily true that the prison system would be as useless as it has shown itself to be in preventing further crime.

On the contrary, it may be that our policy of reliance on prison as a response (in some cases *the* response) to crime is doomed, at least in part, *because* of the unfairness of the process that lands a person in prison. This effect was documented two decades ago by the New York State Joint Legislative Committee on Crime (the "Hughes Committee"). Their study of prisoner attitudes toward plea bargaining (conducted at three maximum security facilities in New York State, including Attica) showed that most inmates were bitter, believing that they did not receive effective legal representation or that the judge did not keep the state's promise of a sentence that had induced them to enter guilty pleas.

The Hughes Committee observed that the large segment of the prison population who believe they have been victimized by the courts or the bar "are not likely to accept the efforts of another institution of society, the correction system, in redirecting their attitudes." The Committee warned that no program of rehabilitation can be effective on a "prisoner who is convinced in his own mind that he is in prison because he is the victim of a mindless, undirected, and corrupt system of justice."

Citing the Hughes Committee report as well as the Kerner Commission, the report of the New York State Special Commission on Attica (the "McKay Commission") investigating the causes of the 1971 prisoner rebellion at the Attica state prison, confirmed that "[t]he prison vans brought to Attica men whose experiences in court made them cynical about the system of justice. The experiences that awaited them there only made them even more antisocial."²⁶ Unfairness in the criminal justice system is by no means restricted to the pre-incarceration period.

25. Elliott Currie, *Social Policy and the Future of Criminal Justice*, 67 THE PRISON JOURNAL 19, 22 (1987).

26. NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 31 (1972) [hereinafter ATTICA REPORT].

Actually, similar conclusions with respect to unfairness during the post-incarceration period had been reached well before World War I. Thomas Mott Osborne, who became the "prophet of prison reform" after his experience "underground" at an Auburn prison disguised as inmate Tom Brown #33,333, and his subsequent role as the reforming warden of Sing Sing prison in the early 1900s, had already documented the counter-productive effects of penal institutions and their impact on rehabilitation.²⁷

Writing in his prison journal while incarcerated as Tom Brown, Osborne concluded that every prisoner hated the prison system "even when he gets along without friction . . . because he knows it is bad; for it tends to crush slowly but irresistibly the good in himself."²⁸

When he left the prison, he asked: What does it all mean? He wrote:

It means just one thing — my friend — for it is you now, you individually, to whom I am speaking; it means that these prisoners are men — real men — your brethren — and mine: It means that if they are men they should be treated like men. It means that if you treat them like beasts it will be hard for them to keep from degenerating into beasts. If you treat them like men you can help them to rise. It means that if you trust them they will show themselves worthy of trust. It means that if you place responsibility upon them they will rise to it.²⁹

Although this view has been the basis and formed the vision for the Association that Osborne founded, at the time, sadly, Osborne's entreaties were ignored. Yet strangely, the rebel cry of the inmates of Attica sixty years later began: "We are men. We are not beasts. And we will not be treated and driven as such." Extensive television coverage on and after September 13, 1971, included footage from D-yard at Attica and comments from inmates and civilian observers, who reported on the demands and in particular, the above-quoted statement by the prisoners.

III. The Response of Urban Minorities to Urban Criminal Justice

While rooted in the old, the rebellion at Attica reflected something new. Just as the Kerner Commission had identified "[a] new mood

27. In 1915, Thomas Mott Osborne founded the Welfare League Association to assist persons discharged from prison. In 1921, he founded the National Society of Penal Information. After his death, in 1931, the two organizations were merged and became The Osborne Association to honor his memory and continue his work.

28. THOMAS MOTT OSBORNE, *WITHIN PRISON WALLS* 134 (Spruce Gulch Press 1991) (1915).

29. *Id.* at 226.

[that] has sprung up among Negroes, particularly among the young, in which self-esteem and enhanced racial pride are replacing apathy and submission to 'the system,'"³⁰ so did the McKay Commission find:

[T]he Attica rebels were part of a new breed of younger, more aware inmates, largely black, who came to prison full of deep feelings of alienation and hostility against the established institutions of law and government, enhanced self-esteem, racial pride, and political awareness, and an unwillingness to accept the petty humiliations and racism that characterize prison life.³¹

It is a matter of history that this "new breed" was for the most part snuffed out. When the war ended, thousands of black veterans returned from Vietnam, some addicted to drugs, all trained in the use of automatic weapons, many without marketable skills, and none receiving the appreciation or support that had greeted veterans of previous wars. Many of those who stayed home had been politicized and began to make unprecedented demands for full equality.

By the 1980s, the "new breed" of the 1960s was gone — some achieving more education and greater success than any generation before them, others lost to drugs, to jail and to the grave. But the *new* "new breed," the children of the children of the 1960s, have not demonstrated the obvious signs of political awareness and racial pride of the 1960s and 1970s, despite valiant attempts by many African-American cultural workers (for example, rap artist Chuck D. of Public Enemy and producer Spike Lee).

Other than their income from drug sales, or the cost of incarcerating them, minority youth in most cases are marginal in the current economy. This is not a fact of which they are unaware, and their anger is keenly felt. It is also patently demonstrated in a number of ways, including truancy, fighting, and stealing. With the cheap and steady supply of guns available to young people, these otherwise minor marks of youth more often end in serious injury and death. In just one New York City borough (Brooklyn) last year, 4,700 juveniles were referred to Corporation Counsel for prosecution, with more than 500 involving the sale of crack and possession with intent to sell.³² Also last year, the Brooklyn district attorney's office prosecuted more

30. NAC REPORT, *supra* note 22, at 11.

31. ATTICA REPORT, *supra* note 26, at 105.

32. Figures supplied by Deputy Chief Steven Bogacz of the Family Court Division of the office of the Corporation Counsel (NYC Department of Law). According to Mr. Bogacz, in 1991, there were 1,450 juveniles citywide charged with crack sales or possession with intent to sell.

than 400 juveniles arrested on violent felonies, including armed robberies and serious assaults. And over the last two years, the number of gangs has increased, with Brooklyn boasting more than twenty-five youth gangs.³³

Some of the behavior memorialized in these arrests, in which "black youths have taken to carrying guns and firing them at one another," is the "self-inflicted genocide" of which Andrew Hacker speaks:

While in one sense these are "free" acts, performed of personal volition, when they become so widespread, they must also be seen as expressing a despair that suffuses much of their race. These are young men who do not know whether they will live another year, and many have given up caring. If they are prepared to waste the lives of others, they will hardly be surprised if their turn comes next.³⁴

But some of the unlawful behavior — drug dealing by adolescents who don't use drugs, for example — may also represent a blow *against* the despair, an imitation of success, a crude demand for a future. And some of the youngsters clearly see their behavior as a reasonable, if not lawful, way to address a real problem. Rap artist Ice Cube (who won acclaim as an actor in the film "Boyz 'N The Hood") spoke for them, and about the significance of lack of job opportunity and education, in his piece "A Bird in the Hand:"

Do I have to sell me
A whole lot of crack
For decent shelter
And clothes on my back?³⁵

Widespread poverty has put enormous pressure on children to contribute to the family's income. Unfortunately, unlike many of their rural cultures of origin, where children could provide two extra hands in the field or the shop, there is little that urban youth can do in an economy in which even able-bodied adults experience difficulty finding employment. Elliott Currie attributes many of the widening social divisions to the far-reaching changes in the ways in which Americans make — or fail to make — a living:

This is not the first time there has been a drastic transformation of work in America. We are still suffering the consequences of the earlier shift that destroyed millions of jobs in agriculture and threw

33. *Id.*

34. HACKER, *supra* note 6, at 218.

35. ICE CUBE, *A Bird in the Hand*, on DEATH CERTIFICATE (Priority Records 1991).

masses of the rural poor into an urban-industrial economy that was no longer really capable of absorbing them. It is their descendants who today make up a big part of what we have come to call the urban "underclass."

Today . . . the kinds of jobs that kept some of these people from falling through the cracks in the past are fast disappearing. . . . And as recent research has repeatedly discovered, the so-called "service" economy is simply not replacing them with enough jobs that can provide a decent living for an adult — or can support a family well enough to make it likely that children will be brought up capably and humanely.³⁶

While legitimate businesses offer few opportunities for these youngsters to earn money, their neighborhoods are the site of significant illegal trade, especially in drugs and weapons. An enterprising young person can earn a considerable sum of money through employment in one of these "businesses."

The lack of opportunity to work one's way out of poverty through legitimate efforts has, predictably, been a key factor in the rise of drug dealing, and thereby the rise of prison populations, especially among young people of color. Although drug dealing is a popular activity among adolescents, it tends to be a source of income quite different than it is for many older dealers who are supporting drug habits. Among young dealers, drug use is infrequent and even frowned upon. The drug of choice, for those who use, is usually alcohol. This is not to underestimate the likelihood that youths who become involved in the drug trade often become immersed in the drug culture and eventually move on to drug use, causing some professionals to refer to drug dealing as the main "gateway" to drug abuse. More than five years have passed since Currie pointed out:

[W]e know all too well, from some of the best research we have on the roots of serious crime, that the kind of poorly paid, dead-end, unstable jobs we are now creating in such profusion cannot offer people — especially young people — a real stake in their communities, a motivating hope for the future, or a shield against the powerful attractions of illicit and often violent ways of making a living — especially the drug trade, which has of course become one of the most stunningly potent sources of violent crime in the eighties and a prime source of rising prison populations.³⁷

This should not suggest that the use or sale of drugs is acceptable to the communities in which it is occurring, and there are some strong

36. Currie, *supra* note 25, at 20-21.

37. *Id.* at 21.

values being expressed by urban minority youth against drug dealing. Again, rap artist Ice Cube, in "Us," says it very clearly:

All you dope dealers
You are bad as the police
Because you, too, kill us . . .
You ain't built us
a supermarket
So we would spend money
with the blacks
Too busy buying gold
and Cadillacs
Sometimes I believe
the hype, man,
We mess it up on ourselves
And blame the white man.³⁸

Nonetheless, positive messages from basketball stars and rap music (which Ice Cube calls the "CNN of black America") are not strong enough to hold back urban youth from this obvious source of employment, even wealth, and participation in the economy. Although using drugs could be the ultimate in resignation to lack of opportunity, selling them may well be the best available access to the free enterprise system.

IV. The Response of the Reformers

Virtually all the studies and treatises cited above, and most government and private studies that have looked at the issues surrounding crime and incarceration, have included intelligent recommendations. Some of these recommendations include: providing and expanding community-based sanctions, eliminating mandatory sentencing, reducing reliance on incarceration, and ensuring that high quality educational and vocational training and mental health and substance abuse treatment, along with other programs designed to reduce recidivism, are available in community corrections programs (including probation and parole), as well as in jails and prisons.

Writing about the future of criminal justice, Professor M. Kay Harris divided most proposals for change into two categories: "systems improvement orientation" and a "broader crime prevention/social reform orientation."³⁹ The systems improvement proposals generally take for granted the existing institutional structures and values, and

38. ICE CUBE, *Us*, on DEATH CERTIFICATE (Priority Records 1991).

39. M. Kay Harris, *Moving Into the New Millenium: Toward a Feminist Vision of Justice*, 67 THE PRISON J. 27 (1987).

are framed as if crime were primarily an individual problem best addressed through more effective or more rigorous enforcement of the law, focusing on "better means of identifying and intervening with individual offenders and of strengthening and increasing the efficiency of existing criminal justice institutions and agencies."⁴⁰

The social reform orientation emphasizes root causes of crime and the need to address them through "social and economic reconstruction, stressing that policies aimed at strengthening families and communities need to be coupled with efforts to promote economic development and full employment."⁴¹ This orientation relies on logic, as well as evidence that traditional social welfare programs and policies can reduce crime.⁴² The criminal justice and correctional policy-makers at the time of the Kerner and McKay Commissions knew full well that there were root causes of crime, and that crime could never be eliminated or even significantly reduced through harsher sentences and more prisons. Their predecessors had well established the point. In fact, thirty years before the Watts riots and thirty-five years before Attica, the prison warden at Sing Sing spoke of the ignorance of *his* predecessors, who had failed to understand the causes of crime, while operating institutions that were themselves criminogenic:

[B]earing in mind that several hundred years ago people had a limited conception of the economic and social factors which brought about delinquency, we cannot blame them, perhaps, for feeling that only through cruel and inhuman methods could criminals be steered into law-abiding ways. They did not realize that the slums, broken homes, lack of education, poverty, and inability to obtain employment were causative factors in producing anti-social conduct. They did not know, as we do today, that in fact, the faults of all our social institutions become the problems of penology.⁴³

Neither of these orientations has carried the day. Systems improvement supporters, despite massive increases in incarceration, harsher penalties, electronic technologies, and process efficiencies, have been unable to demonstrate that their crime control measures have made much difference in reducing crime, decreasing violence, or ameliorating the concerns of victims. On the other hand, social reform advocates have been unable to get beyond the perception that their

40. *Id.*

41. *Id.*

42. Research on the Head Start program has documented that every dollar invested in early prevention and intervention resulted in savings of \$4.75 in remedial education, welfare and crime. See MAUER, *AMERICANS BEHIND BARS*, *supra* note 7, at 15 & n.27.

43. Address by Warden Lewis E. Lawes, in OSBORNE ASSOCIATION, INC., 1937 ANNUAL REPORT (1938) (on file with author).

recommendations are too expensive, politically unfeasible, unproven or ineffective.

Most efforts are well meaning, and increasing numbers of those with a systems improvement orientation include references to funding for social and economic reconstruction, including employment and housing initiatives. For example, with regard to drug-related crime, current law enforcement policy seems to support the present response of increased incarceration (including mandatory penalties with no apparent reduction in drug use or sales), while also endorsing prevention and treatment to attack the "demand" for drugs and the underlying causes of addiction.

With regard to "violent" crime, no such balance exists even in the rhetoric. Current policy, including a punishment system of massive proportions relying overwhelmingly on bricks, mortar, and iron bars, has been compared to fighting cancer by building more hospitals to treat cancer victims instead of teaching prevention and conducting research for a cure.⁴⁴ It is also violent crime that is most highly charged in its relationship (too often assumed, too often unspoken) to race.

In looking for future solutions beyond the existing orientations, it can be valuable to look outside our own time, place, and view. For example, the observations of our predecessors might be valuable in our study of urban criminal justice and whether or how it might be expected to reduce crime. It was, in fact, during the 1930s when Warden Lawes began identifying causes that seem relevant in the 1990s:

Since the depression it is apparent that more men with previous untarnished records are committing crimes than ever before. In many instances, those men are willing to work but because of economic conditions are unable to do so. Millions today cannot obtain employment. Many more now being trained for particular types of vocations will soon find that they will be denied the right to earn a livelihood through no fault of their own. I am a prison warden, not an economist. But it seems tragic to me that, in this country which has some unlimited resources and where foodstuffs and other commodities can be produced in abundance, there should be such economic chaos.⁴⁵

The relationship between economic chaos and racial chaos, or for

44. In advancing this analogy, Mauer points out that "education and prevention efforts in health care are not considered 'soft on disease'; neither should these types of policies be considered 'soft on crime' in the area of crime control policy." MAUER, *AMERICANS BEHIND BARS*, *supra* note 7, at 15.

45. Address by Warden Lewis E. Lawes, *supra* note 43.

that matter, the relationship between economic justice and racial justice, is no doubt a critical distinction in the search for fairness as well as effectiveness in the urban criminal justice system. Unfortunately, if not for a beating like that of Rodney King, or a murder like that of Yusef Hawkins, those who make criminal justice policy are unlikely to give more than brief attention to the issue of race. Then again, those who make criminal justice policy are only rarely people of color.

Interestingly, the work of Thomas Mott Osborne might be seen as irrelevant to the pressing issues of race and racism that have overwhelmed the operation of the criminal justice system. During his time, virtually no blacks were behind bars.

This would suggest they were really very law-abiding, since most blacks lived in the South, where they could have been imprisoned with relative ease. At the same time, the dramatic drop in the white proportion does not necessarily mean that white people have become more honest. A more accurate explanation is that over the last half-century most white Americans have moved upward on the social scale, so that fewer of them remain among the class of people who tend to receive prison terms. In the United States and elsewhere, people who are poor and have sporadic employment end up filling most of the cells.⁴⁶

Many people think it is impossible to reverse the continuing trend toward "two nations," one black and one white, or a "dual society," one rich and one poor. This should not discourage us; according to former Supreme Court Justice Louis Brandeis, "most of the things worth doing in the world had been declared impossible before they were done."

It is hard to imagine anything more worth doing than to empower young people to generate a future for themselves. Inside the current paradigm, which holds that we must choose one approach or the other, there is not much hope of resolving our dilemma. Unfortunately, when we are in the middle of a paradigm, it is hard to imagine any other.

We must, however, be willing to challenge existing options and firmly held assumptions. In doing so, we can of course look to other crises, as well as to other historical periods. In terms of addressing a problem as intractable as crime, we can look to world hunger. Neither systems improvements in food production, nor social reform in distribution, has been effective on its own. Successful treatment of starvation has not occurred merely because those with abundant re-

46. HACKER, *supra* note 6, at 196-97.

sources gave food to the poor. Rather, the greatest progress has occurred when opportunities were made available to hungry people *to bring their own hunger to an end*.

With respect to an issue more closely related to our own, Thomas Mott Osborne signalled a paradigm shift that has yet to fully manifest itself. First as a prison warden, and then as a prison reformer, Osborne established a system of inmate self-governance, the Mutual Welfare League, with the motto DO GOOD, MAKE GOOD. His notion of prison reform went considerably beyond notions of fair treatment and humane conditions, to the empowerment of the inmates in his charge.

In the minds of many the reform of the Prison System has been accomplished when a cold-hearted, brutal autocrat has been replaced by a kindly, benevolent autocrat. But so far as the ultimate success of the prisoner is concerned there is not much to choose. The former says, "Do this, or I will punish you." The latter says, "Do this, and I will reward you." Both leave altogether out of sight the fact that when the man leaves the shelter of the prison walls there will be no one either to threaten punishment or to offer reward. Unless he has learned to do right on his own initiative there is no security against his return to prison.⁴⁷

In the new paradigm, it seems likely that the solutions to "minority crime" will emerge only when African-American communities have an opportunity to fully participate in the solutions and end the violence and drug traffic in their own communities. This does not mean that the criminal justice system cannot or should not be improved, made more fair, more free of bias and discrimination. Nor does it mean that we should not address the causative factors, and implement programs and policies that have been proven effective in preserving families, supporting children, generating employment and ending abject poverty. As Elliot Currie suggests:

[T]o create safer, more livable communities and a criminal justice system that embodies our aspirations [will] involve changes *both within and outside the justice system itself*. There are those who believe that we can have a humane and efficient system of criminal justice in the midst of a brutalizing and estranging social order; I am not one of them.⁴⁸

Blacks comprise an insignificant proportion of the policy-makers and decision-makers, whose choices impact the lives of minority people. Communities of color are not selecting or paying precinct com-

47. OSBORNE, *supra* note 28, at 228.

48. Currie, *supra* note 25, at 24 (emphasis added).

manders, policy makers or judges. Even officials that are black most often answer to a nonblack power structure, rather than to the minority community affected by the decisions.

In the new paradigm, police will not be an army of occupation, but an extension of ourselves. Everyone's contribution will matter, everyone's talents will be put to good use. People who commit crimes will know they are harming a part of themselves, and those of us who incarcerate them will experience that we are locking up a part of ourselves.

V. The Osborne Association's Role

The Osborne Association has been providing model educational, employment, treatment, and support services to prisoners, ex-offenders, defendants, and their families for sixty years. What distinguishes our programs is not that they address the root causes of crime (all good crime prevention programs do that) or that they meet the criminal justice system's need for accountability and structure (all good community corrections programs do that.) What makes the Association's work distinct is the philosophy of its founder, Thomas Mott Osborne, who chose to treat prisoners as full partners in their own rehabilitation, and provide opportunities for them to make choices.

Today, the Association's programs aim to address all those factors that have been identified as "root causes" of crime — family instability, chemical dependency, unemployment, illiteracy. In doing so, we provide extensive health and HIV services, parenting education, vocational counseling and placement, detoxification and drug treatment. But to a large degree, the success of these programs is derived from the respect and caring for those we serve. This authentic respect allows and encourages us to build on skills young people already have, and that create a possibility for a future. The Osborne Association's purpose is to do just that. Our most recent program initiative, LEGIT, is an example.

LEGIT draws from a wide array of services already provided, and is based on what we know, not only from the studies, but from our own experience. In designing the program, we reviewed the demographic characteristics of fifty-eight clients between the ages of fourteen and eighteen served by one of the Osborne Association's programs over the past two years.⁴⁹ Of this group, only three are female. All but five are African-American or Latino. We have noted

49. The Assigned Counsel Alternatives Advocacy Program (ACAAP) provides defender-based sentencing advocacy and other services to assigned lawyers.

a dramatic and progressive increase in the number of youngsters being raised by an adult other than a natural parent. Nearly one-third of the fourteen and fifteen-year-old clients accepted over the last two years were living with relatives other than parents. Almost 30% of clients age sixteen and seventeen were in foster care, with relatives or homeless. A significant and increasing number of our clients have one or two parents who are absent due to incarceration, drug abuse, or death (with homicide and AIDS being the most frequent causes).

Less than half of our young clients are in school, and fewer still are working. Of our fourteen- to sixteen-year-olds, eighteen are students (three with jobs), and sixteen are drop-outs and unemployed. Our seventeen-year-olds are evenly divided between students and drop-outs. Our eighteen-year-olds include two unemployed graduates, three unemployed students, and seven drop-outs, all unemployed except one who has a part-time job.

A more anecdotal review of our data and experience led us to conclude that for most juveniles, drug dealing (and sometimes other criminal behavior, including robbery) is an activity in which they engage for three reasons: Money, Risk/Danger and Status/Power/"Juice." We realized that a program that intends to curtail or eliminate criminal activity will have to address all three reasons young people engage in it, and to some degree provide elements of all three: income, excitement, and status.

The Osborne Association's fledgling micro-enterprise program is one way to do this. LEGIT will target juveniles who would otherwise be placed in secure facilities for selling drugs. The program will build on our clients' entrepreneurial skills in developing legitimate small businesses. Micro-enterprise is the most promising avenue available to people to generate legitimate income, especially in a recessionary economy. The newspaper is full of accounts of laid-off workers who have gone into business for themselves after lengthy unsuccessful searches for new jobs. It allows people to "use what they've got to get what they need," and enables people to profit from their own labor in a very clear way. It also capitalizes on the skills young people may already have to recognize supply and demand in their own neighborhoods, and to fill useful needs.

The specific goals of LEGIT are:

- (1) To increase legitimate entrepreneurial opportunities for minority youth that will enable them to mature into productive, participating members of the community.
- (2) To train minority youth to establish and operate self-sustaining legitimate micro-enterprises as an alternative to illegal in-

come, and to empower youth to utilize their energy, skills, and desire to contribute in ways that are socially desirable.

(3) To develop a diversionary program for drug-dealing and delinquent youth that is appropriate and effective in reducing further involvement in criminal activity and decreasing incarceration of minority youth.

(4) To serve the communities in which minority youth live, by the creation of viable enterprises that provide needed goods and services.

Entrepreneurship does, of course, involve risk — of failure — but it can replace the excitement of crime with the thrill of accomplishment. People can get “juice” from conquests other than those associated with drug dealing or guns, and perhaps most important: there is the possibility of a future. Unfortunately, to date there have been insufficient legitimate sources of money and “juice” in urban areas.

LEGIT will have small groups or “teams” of young people who will be coached to generate ideas for, and proficiency in, very small business ventures that would include services, products for re-sale, or producing original items for sale. Such a model involves both job creation as well as intensive training. It also provides individual, family, and group supports and counseling for each member of the team.

Reversal of the growing trend toward a divided or dual society demands:

First and foremost . . . a wholehearted and creative employment policy, of a kind we have never really had in this country, but which some other countries have been using with great success for many years; one that does not stop with skimpy training and temporary work experience, but instead enlists government, the private sector, and nonprofit organizations in direct job creation, intensive training for the disadvantaged, and comprehensive, accessible re-training for workers displaced by technological change.⁵⁰

Currie is correct in insisting that we must underline the notion of “intensive” training: “We must recognize that many of the people most at risk of serious crime have a great many problems that must be overcome if they are to enter the labor market with any hope of success, and overcoming them will not, cannot, come easily — or cheaply.”⁵¹

LEGIT is also, almost literally, a page out of our history. Over a half century ago, Warden Lewis Lawes of Sing Sing Prison addressed

50. Currie, *supra* note 25, at 24.

51. *Id.*

the Annual Meeting of the Osborne Association, and spoke of the needs of youth:

All of us are interested in preserving our democracy. *I can think of no more effective way to do so than by assuring our youth that the doors of opportunity are still open to them.* Whether we manifest that assurance by private industry creating more jobs or through the medium of government work projects, we must give every young boy and girl an opportunity to lead a normal existence — not an idle one. *People have been known to overstep the limitations of law when they are in economic distress.* As a prison warden it is my duty to present this matter to you. I hope the leaders of the nation will take cognizance of this situation. I am certain you all agree that something must be done.⁵²

52. Address by Warden Lewis E. Lawes, *supra* note 43 (emphasis added).